

NO. 22051 ✓

IN THE UNITED STATES COURT OF APPEALS  
NINTH CIRCUIT

TERRANCE I. POSTON, a citizen  
of Alaska,

Plaintiff-Appellant,

vs.

THE UNITED STATES OF AMERICA,  
HAWAIIAN ELECTRIC COMPANY, INC.,  
an Hawaiian corporation, and  
GEORGE OKANO ELECTRICAL SERVICE,  
LTD., an Hawaiian corporation,

Defendants-Appellees.

BRIEF OF CROSS-APPELLEE

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Of Counsel

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Cross-Appellee George Okano  
Electrical Service, Ltd.

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## JURISDICTION

This is an action for damages for personal injuries brought by the plaintiff, Terrance I. Poston. The action was filed on January 26, 1965, in the United States District Court for the District of Hawaii against the defendants The United States of America, Hawaiian Electric Company, Inc., a Hawaii corporation (hereinafter called Hawaiian Electric), and George Okano Electrical Service, Ltd., a Hawaii corporation (hereinafter called Okano) (R.O.A. 2-19). Plaintiff is a citizen of the State of Alaska (Tr. 139-40).

The amount in controversy exceeded the sum of \$10,000 exclusive of interest and costs. The United States District Court for the District of Hawaii had jurisdiction on the basis of diversity of citizenship (28 U.S.C.A. §1332) and the Federal Tort Claims Act (28 U.S.C.A. §§1346(b), 2671, et seq.).

Defendant Hawaiian Electric, having filed notice thereof on February 24, 1967 (R.O.A. 191), cross-appealed from the order directing a verdict for defendant Okano and against Hawaiian Electric on Hawaiian

## CHAPTER I

THE HISTORY OF THE UNITED STATES OF AMERICA

FROM THE FIRST SETTLEMENTS TO THE PRESENT TIME  
BY J. W. FULTON, ESQ., OF NEW-YORK  
IN TWO VOLUMES. VOL. I.  
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Electric's cross-claim.

The United States Court of Appeals for the Ninth Circuit has jurisdiction under 28 U.S.C.A. 1291.

QUESTION PRESENTED

The basic question presented by the cross-appeal of Hawaiian Electric is whether this court should finally dispose of Hawaiian Electric's cross-claim against Okano, if there is a reversal of the directed verdict granted Hawaiian Electric by the court below, or whether that cross-claim should under those circumstances continue to remain in existence forcing Okano to again participate in the trial court if remand is allowed.

Okano admits that if this court should reverse both Okano and Hawaiian Electric on the verdicts directed against Poston below, then Hawaiian Electric's cross-claim for contribution should stand. If both verdicts against Poston are affirmed, this appeal is moot.

Therefore, this brief only addresses itself

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The University of Chicago is a private, non-profit, research university. It is one of the leading universities in the world, and is known for its high academic standards and its commitment to research and scholarship. The university is located in Chicago, Illinois, and has a long history of excellence in education and research. It is a member of the Association of American Universities and is ranked among the top universities in the world by various ranking agencies. The university is known for its strong commitment to research and scholarship, and for its high academic standards. It is a leading center for research in many fields, and has produced many notable scholars and researchers. The university is also known for its commitment to public service and to the advancement of the human condition. It is a university that is dedicated to the pursuit of knowledge and to the betterment of the world.

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to the situation where this court affirms the directed verdict for Okano against Poston and reverses the directed verdict for Hawaiian Electric against Poston.

### ARGUMENT

The trial court was correct in ordering that a verdict be entered for defendant Okano and against defendant Hawaiian Electric in respect to the latter's cross-claim against Okano for contribution as

a. The cross-claim was not moot and required decision by the court when the motion for directed verdict was made by Okano.

b. No evidence had been offered to show that Okano was a joint tortfeasor.

The trial court's verdict as to the cross-claim was a final judgment for purposes of appeal and therefore Hawaiian Electric's cross-appeal is not premature and must be decided at this time by the court.

If this court reverses the order of the trial court entering a directed verdict in favor of Hawaiian Electric against Poston, the trial court's order of a



directed verdict for Okano on Hawaiian Electric's cross-claim should still be affirmed.

I

TRIAL COURT'S ORDER DIRECTING A VERDICT  
FOR OKANO ON HAWAIIAN ELECTRIC'S CROSS-CLAIM IS FINAL

Hawaiian Electric's contention that the directed verdict on its cross-claim in favor of Okano was made moot by the directed verdict rendered in its favor as to the claims of Poston is without merit.

The trial court's act in granting Okano's motion for a directed verdict in respect to the cross-claim on January 18, 1967 followed by the signing of a written order to that effect on January 25, 1967 with judgment pursuant to these orders entered by the clerk constituted a final judgment for purposes of appeal.

Since all parties had rested and all evidence was in when Okano moved for a directed verdict on the cross-claim on January 18, 1967, it is Okano's contention that Rule 54(b) of the Federal Rules of Civil Procedure has no application in this situation.

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However, assuming that said rule does apply and assuming that the trial judge made no express determination on January 18, 1967 pursuant thereto, the entering of the order was final nonetheless. Absent the express determination under Rule 54(b) "that there is no just reason for delay and upon an express direction for the entry of judgment," it has been held that the judge's silence will be treated "as the equivalent of . . . an explicit reservation; in failing to utter a determination, he is deemed to have made his order subject to his own recall at any time before the end of the entire litigation . . . ." (emphasis added). Republic of China v. American Express Co., 190 F.2d 334, 338, 339 (2nd Cir. 1951) Unless the trial judge acts specifically to recall the prior order, at the end of the entire litigation the entry of judgment is final and appealable. In the instant case, the date of the "end of the entire litigation" and the date of the written order of the directed verdict for Okano were the same, January 25, 1967. No specific recall or amendment to the July 18, 1967 order was made by the trial judge, and he obviously intended none as evidenced by his signing the written order on





January 25, 1967.

Thompson v. Trent Maritime Company, Ltd., 343 F.2d 200 (3rd Cir. 1965) is cited by Hawaiian Electric to support its contention that its cross-claim against Okano was moot when the trial judge signed the written order because he had by then granted Hawaiian Electric's oral motion for directed verdict against Poston.

Thompson held that a jury verdict in favor of a third-party defendant was not final and appealable until final judgment as to all parties was entered to avoid piecemeal litigation.

Here final judgment as to all parties has been entered and the Thompson case clearly supports Okano's position because a failure by this court to consider the validity of the cross-claim would definitely result in such piecemeal litigation.

## II

IF OKANO'S DIRECTED VERDICT AGAINST POSTON IS AFFIRMED  
HAWAIIAN ELECTRIC HAS NO CAUSE OF ACTION AGAINST OKANO.



Hawaiian Electric's cross-claim filed March 24, 1965 contains no allegation that plaintiff's alleged injuries were the result of Okano's negligence, but simply states in paragraph 20 thereof that "if it be determined that he is entitled to recover from any party, said right of recovery is against either or both of the defendants other than this defendant." The cross-claim does, however, contain a prayer for determination of relative degree of fault in the event Okano and Hawaiian Electric are found to be joint tortfeasors.

Assuming that the cross-claim states a cause of action as to Okano for contribution, this claim cannot continue to exist if this court affirms the verdict for Okano against Poston on the merits. If Poston has no claim against Okano, Hawaiian Electric cannot have a claim for contribution against Okano.

The Revised Laws of Hawaii 1955 in Chapter 246, The Uniform Contribution Among Tortfeasors Act defines joint tortfeasors as follows:

§246-10 Joint tortfeasor defined. For the purpose of this part of the term "joint tortfeasor"



means two or more persons jointly or severally liable in tort for the same injury to person or property, . . . .

18 Am.Jur., Contribution §49, page 71

As a general proposition, a person compelled to discharge a liability for a tort cannot recover contribution from another whose participation therein gave the injured person no cause of action against him,

In construing this principle in Hawaii, the District Court in Oahu Ry. and Land Co. v. U. S., 73 F.Supp 707 (D.C. Hawaii 1947) held:

. . . the Act (Joint Tortfeasors Act) is only applicable to a situation where there is a common liability to an injured person in tort. Such liability may be joint or several, but there can be no contribution where the injured person has no right of action against the third party defendant. The right of contribution is a derivative right and not a new cause of action. (citing with approval Baltimore Transit Co. v. State, 183 Md. 674, 39 A.2d 858, 860, 861, (1944)).

Therefore, Hawaiian Electric's claim for contribution from Okano is dependent upon Okano's liability to Poston. Absent such liability, there is no ground for the cross-claim which gives rise to the present appeal.

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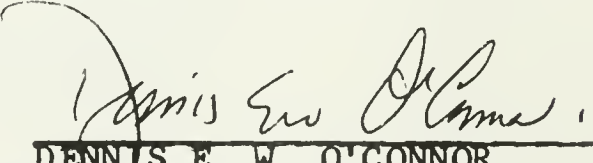
### CONCLUSION

The trial court's directed verdict for Okano against Hawaiian Electric on its cross-claim was final and the appeal taken from that final judgment must be decided by this court in conjunction with Poston's appeal on the merits.

Since no evidence was introduced to support the cross-claim, if this court reverses the verdict for Hawaiian Electric against Poston, the verdict below for Okano against Hawaiian Electric on the cross-claim should be affirmed.

DATED: Honolulu, Hawaii, September 22, 1967.

Respectfully submitted,



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ROBERTSON, CASTLE & ANTHONY  
Of Counsel

Attorney for George Okano  
Electrical Service, Ltd.



# CHAPTER I

THE first of the three main divisions of the subject is the study of the general principles of the theory of the function of a complex variable. The second division is the study of the properties of the function of a complex variable, and the third division is the study of the applications of the theory of the function of a complex variable.

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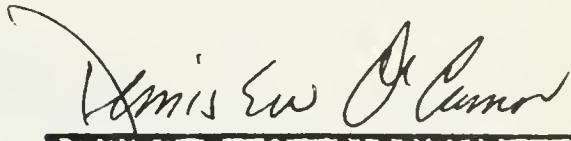
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THE



CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

  
DENNIS E. W. O'CONNOR

# MEMORANDUM

TO : THE PRESIDENT  
FROM : THE SECRETARY OF THE ARMY  
SUBJECT: [Illegible text]

[Illegible signature and text]